

**Letter of Findings: 09-0566
Gross Retail Tax
For the Year 2006 and 2007**

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ISSUES

I. Gross Retail Tax – Sales to Out-of-State Customers.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-5-39; IC § 6-8.1-5-1(c); [45 IAC 15-3-2](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); Sales Tax Information Bulletin 28S (February 2008); Sales Tax Information Bulletin 72 (June 2006); Sales Tax Information Bulletin 72 (July 2008).

Taxpayer protests the imposition of the Gross Retail (Sales) Tax on sales of recreational vehicles to out-of-state customers.

II. Gross Retail Tax – Trade-in Allowance.

Authority: IC § 6-2.5-1-6.

Taxpayer protests the denial of trade-in allowance.

III. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

Taxpayer protests the imposition of the ten percent negligence penalty.

STATEMENT OF FACTS

Taxpayer is an Indiana dealer selling recreational vehicles (RVs). Pursuant to an audit, the Indiana Department of Revenue ("Department") determined that, during 2006 and 2007 tax years, Taxpayer failed to collect and remit the gross retail tax ("sales tax") on several RVs which Taxpayer sold to out-of-state customers. The Department's audit assessed sales tax, interest, and penalty. Taxpayer protested the assessments. A hearing was held. This Letter of Findings ensues. Additional facts will be provided as necessary.

I. Gross Retail Tax – Sales to Out-of-State Customers.

DISCUSSION

After an audit, the Department assessed Taxpayer sales tax on the RVs which it sold to out-of-state customers during 2006 and 2007 tax years. Taxpayer, to the contrary, argued that it was not responsible for collecting sales tax on the sales to out-of-state customers.

As a threshold issue, all tax assessments are prima facie evidence that the Department's claim for the unpaid tax is valid; the taxpayer bears the burden of proving that any assessment is incorrect. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

Indiana imposes a sales tax on retail transactions. IC § 6-2.5-2-1 states:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires tangible personal property in a retail transaction is liable for the tax on the transaction and shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

Taxpayer, a dealer selling RVs, is a retail merchant and, therefore, is responsible for collecting and remitting the sales tax.

IC § 6-2.5-5-39, in relevant part, states:

- (b) As used in this section, "recreational vehicle" means a vehicle with or without motive power equipped exclusively for living quarters for persons traveling upon the highways. The term includes a travel trailer, a motor home, a truck camper with a floor and facilities enabling it to be used as a dwelling, and a fifth wheel trailer.
 - (c) A transaction involving a cargo trailer or a recreational vehicle is exempt from the state gross retail tax if:
 - (1) the purchaser is a nonresident;
 - (2) upon receiving delivery of the cargo trailer or recreational vehicle, the person transports it within thirty (30) days to a destination outside Indiana;
 - (3) the cargo trailer or recreational vehicle will be titled or registered for use in another state or country;
 - (4) the cargo trailer or recreational vehicle will not be titled or registered for use in Indiana; and
 - (5) the cargo trailer or recreational vehicle will be titled or registered in a state or country that provides an exemption from sales, use, or similar taxes imposed on a cargo trailer or recreational vehicle that is purchased in that state or country by an Indiana resident and will be titled or registered in Indiana.
- A transaction involving a cargo trailer or recreational vehicle that does not meet the requirements of subdivision (5) is not exempt from the state gross retail tax.
- (d) A purchaser must claim an exemption under this section by submitting to the retail merchant an affidavit

stating the purchaser's intent to:

- (1) transport the cargo trailer or recreational vehicle to a destination outside Indiana within thirty (30) days after delivery; and
- (2) title or register the cargo trailer or recreational vehicle for use in another state or country.

The department shall prescribe the form of the affidavit, which must include an affirmation by the purchaser under the penalties for perjury that the information contained in the affidavit is true. The affidavit must identify the state or country in which the cargo trailer or recreational vehicle will be titled or registered.

(e) The department shall provide the information necessary to determine a purchaser's eligibility for an exemption claimed under this section to retail merchants in the business of selling cargo trailers or recreational vehicles. (Emphasis added.)

Sales Tax Information Bulletin 72 (June 2006) listed states and countries which meet the statutory requirements as well as states and countries which are subject to Indiana sales tax. Subsequently, the Department updated the Sales Tax Information Bulletin 72 (July 2008) which, in relevant part, states:

III. EXEMPTION FROM THE SALES TAX

Effective July 1, 2006, sales of recreational vehicles and cargo trailers by Indiana dealers destined for out-of-state registration will be exempt from the Indiana sales tax if the state where the recreational vehicle or cargo trailer is going to be registered provides a similar exemption for an Indiana resident making a purchase in that state. This exemption also applies to states that do not impose a sales tax. Forty-one states listed below, plus the District of Columbia provide a drive-out exemption, provide reciprocity, or have no sales tax.

Alabama	Alaska	Arkansas
Colorado	Connecticut	Delaware
Dist. of Columbia	Georgia	Idaho
Illinois	Indiana	Iowa
Kansas	Kentucky*	Louisiana
Maine*	Maryland	Minnesota
Missouri	Montana	Nebraska
Nevada	New Hampshire	New Jersey
New Mexico	New York	North Dakota
Ohio	Oklahoma	Oregon
Pennsylvania	Rhode Island*	South Dakota
Tennessee	Texas	Utah
Vermont	Virginia	Washington
West Virginia	Wisconsin	Wyoming

*Only applies to recreational vehicles

IV. STATES WITH NO EXEMPTION

There are nine states plus Canada, Mexico, and all other foreign countries that do not provide an exemption for vehicles to be registered in Indiana. Because of this, purchases 1) made from Indiana dealers and 2) to be registered in one of the following will be required to pay Indiana sales tax at the time of purchase.

Arizona	California	Florida
Hawaii	Massachusetts	Michigan
Mississippi	North Carolina	South Carolina

V. PROOF OF EXEMPTION

A purchaser who is purchasing a recreational vehicle or cargo trailer in Indiana to be registered in another state must complete an affidavit of exemption (Form ST137RV) when he purchases the recreational vehicle or cargo trailer. The purchaser certifies under penalty of perjury that he is not an Indiana resident and will remove the recreational vehicle or cargo trailer within 30 days to be registered in one of the states listed in the exemption from sales tax category.

The original signed ST137RV form must be mailed to the Department of Revenue by the Indiana retail merchant within 30 days of the purchase invoice date. The Department of Revenue will notify the purchaser's state of residence as indicated on the ST-137RV form. The selling dealer must maintain a copy of the ST-137RV in order to document non-collection of the Indiana sales tax. (Emphasis is original.)

Sales Tax Information Bulletin 28S (February 2008), in pertinent part, also states:

INTRODUCTION

General Application of Sales Tax:

Effective July 1, 2004 ALL SALES of motor vehicles and trailers purchased in Indiana are subject to Indiana sales tax. This includes sales where the purchaser intends to immediately register, license or title

for use in another state.

Recreational Vehicles and Trailers Only:

Effective July 1, 2005 a partial to a full exemption may be applicable to the purchase of a recreational vehicle (RV) or a cargo trailer (as defined by I.C. 6-2.5-5-39) pertaining to the purchase by a NONRESIDENT only. Additional information on this exemption is available on the Department's Web site at <http://www.in.gov/dor/3786.htm>

Recreational Vehicles and Trailers Only:

Effective July 1, 2006 a full exemption is applicable to the purchase of a recreational vehicle (RV) or a cargo trailer by a NONRESIDENT if the purchaser affirms the purchase will be registered/titled within 60 days in a reciprocal state or country. A reciprocal state is one that will allow an exemption to an Indiana resident who purchases a recreational vehicle or trailer to be registered/titled in Indiana. Dealers must collect the Indiana sales tax on sales to a nonresident of Indiana if registering or titling in one of the following non-reciprocal states/countries.

California

Florida

Maine

Massachusetts

Michigan

Mississippi

North Carolina

South Carolina

Canada

Mexico

All Other Countries

(Emphasis in original.)

In this instance, Taxpayer sold the RVs to customers in California, Florida, Michigan, North Carolina, South Carolina, as well as Canada, which are states and/or countries that do not provide reciprocal exemptions to Indiana residents who purchase RVs to be registered or titled in Indiana. Taxpayer thus must collect and remit sales tax to the State of Indiana on the RV sales pursuant to IC § 6-2.5-5-39(c) and both 2006 and 2008 Sales Tax Information Bulletin 72.

Taxpayer stated that it sold the RVs and delivered the RVs to the out-of-state purchasers. Taxpayer, referring to the U.S. Constitution, argued that the sales constituted "interstate commerce" and were exempt from Indiana sales tax, and, therefore, Taxpayer was not responsible for collecting and remitting the sales tax. To support its protest, Taxpayer submitted invoices showing the charge for delivery. Taxpayer also provided its employee's affidavits stating that the employee delivered the RVs in question to out-of-state purchasers.

Taxpayer has invited the Department to interpret the U.S. Constitution and apply the "interstate commerce" exemption in its favor. The Department, however, must respectfully decline Taxpayer's invitation. The administrative hearing is not a proper forum to address Taxpayer's concerns regarding federal constitutional principles. The Indiana legislature specifically established statutory requirements, in IC § 6-2.5-5-39, for sales of RVs to be exempted from sales tax. Taxpayer is an RV dealer selling RVs, and, thus, Taxpayer must abide by the statutory requirements in order to claim the exemption.

Taxpayer's documentation showed that it sold one RV to a purchaser in Arizona, a reciprocal state. However, Taxpayer did not submit the original signed ST137RV form regarding this RV sale, nor did Taxpayer date its invoice to memorialize the transaction. Taxpayer's work-order stated that it charged the customer for delivery, but the information was not complete. Although Taxpayer offered its employee's affidavit stating that the employee delivered the RV to the Arizona purchaser, the affidavit of a current employee does not outweigh the absence of sufficient documentation. In the absence of sufficient documentation, the Department is unable to conclude that Taxpayer has met its burden of proof.

The remaining sales of Taxpayer's RVs were to the out-of-state customers who resided in the non-reciprocal states and/or countries, including, but not limited to, Florida, California, Michigan, North Carolina, South Carolina, and Canada. Pursuant to IC § 6-2.5-5-39(c), Sales Tax Information Bulletin 72, and Sales Tax Information Bulletin 28S, the purchasers were not entitled to the exemption. Thus, Taxpayer must collect sales tax regardless of delivery.

FINDING

Taxpayer's protest is respectfully denied.

II. Gross Retail Tax – Trade-in Allowance.

DISCUSSION

The Department's audit assessed Taxpayer sales tax based on the full amount of sales price concerning three RV sales for which Taxpayer's customers traded in their RVs (trade-ins). Taxpayer then deducted the trade-in amount ("trade-in allowance") from the sales price of the RVs. Taxpayer thus claimed that, it was entitled to the "trade-in allowance" because the trade-ins were "like kind" exchange, not subject to sales tax.

IC § 6-2.5-1-6 states:

(a) "Like kind exchange" means the reciprocal exchange of personal property between two (2) persons, when:

- (1) The property exchanged is of the same kind or character, regardless of grade or quality; and
- (2) The persons exchanging the property both own the property prior to the exchange.
- (b) A "like kind exchange" may be a part of a transaction involving additional consideration other than the exchanged property.
- (c) Notwithstanding subsection (a), a "like kind exchange" does not occur when:
 - (1) The transaction involves more than two (2) persons; or
 - (2) One (1) party to the transaction, through agreement or negotiation with the second party, acquires personal property for the primary purpose of exchanging that property for like kind property held by the second party.

Taxpayer's documentation showed that the purchasers traded in their RVs upon purchasing Taxpayer's RVs. Taxpayer's documentation also showed that it deducted the trade-in amount from the sales price of Taxpayer's RVs. Since the customers traded in their RVs in exchange for Taxpayer's RVs, the amount deducted from the RVs' sales price was "like kind" exchanges. Therefore, the trade-in amount, i.e., trade-in allowance, was not subject to sales tax.

In short, Taxpayer was entitled to the trade-in allowance on the three transactions, as follows:

Date	Serial Number	Sales Price	Trade-in Allowance
8/16/2006	4YDT299206C134494	18,900	7,900
3/23/2007	4YDF361337R801005	40,500	31,694
4/02/2007	4YDF29T297E750903	32,645	15,000

Upon a supplemental audit, the Department will recalculate the tax due.

FINDING

Taxpayer's protest is sustained.

III. Tax Administration – Negligence Penalty.

DISCUSSION

Taxpayer also protests the assessment of the negligence penalty.

Pursuant to IC § 6-8.1-10-2.1, the Department may assess a ten (10) percent negligence penalty if the taxpayer:

- (1) fails to file a tax return;
- (2) fails to pay the full amount of tax shown on the tax return;
- (3) fails to remit in a timely manner the tax held in trust for Indiana (e.g., a sales tax); or
- (4) fails to pay a tax deficiency determined by the Department to be owed by a taxpayer.

[45 IAC 15-11-2](#)(b) further states:

"Negligence" on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The Department may waive a negligence penalty as provided in [45 IAC 15-11-2](#)(c), in part, as follows:

The department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published department instructions, information bulletins, letters of findings, rulings, letters of advice, etc.;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer failed to provide sufficient documentation affirmatively establishing that its failure to timely remit tax held in trust was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest on the imposition of the negligence penalty is respectfully denied.

SUMMARY

For the reasons discussed above, Taxpayer's protest on the trade-in allowance is sustained. However, Taxpayer's remaining protest is respectfully denied.

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